INDEX.

CITATIONS.

Cases

Statutes and Regulations

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1087

LACY D. KIRKMYER, ET AL., Partners trading as James River Oil Company,

Petitioners,

vs.

ARKANSAS FUEL OIL COMPANY, a West Virginia Corporation,

Respondent.

BRIEF FOR RESPONDENT

In Opposition To The Petition For Writ of Certiorari To The United States Circuit Court of Appeals For The Fourth Circuit.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit in this case is reported at *158 Fed (2d) 821, Advance Sheets, March 10, 1947;* the memorandum opinion of the District Court for the Eastern District of Virginia *(R. 12)* is not reported.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on January 6, 1947 *(R. 176)*. The petition for a writ of certiorari was filed on March 3, 1947. Jurisdiction of this Court is invoked under *Section 240(a)* of the *Judicial Code*, as amended by the *Act of February 13, 1925, 28 USC, Section 347.*

STATEMENT OF THE CASE.

This suit was begun by respondent to recover the agreed price of petroleum products sold to petitioners in the spring and summer of 1943. Petitioners admitted the sales and agreed prices, but made the affirmative defense of illegality, sustained by the District Court and rejected by the Court of Appeals, that the agreed prices were in excess of maximum prices lawful under price control. A summary statement describing earlier dealings between the parties is necessary to an understanding of their present controversy.

In October, 1941 and continuing to May 8, 1942, respondent was selling gasoline to petitioners, in tank ship quantities, delivered into petitioners' terminal in the harbor of Norfolk, Virginia, at a price of $0.575 per gallon. This course of business had continued for several years; and the sales were being made in accordance with the provisions of a written contract *(R. 63)* which, at the time mentioned, was pending on a "run-off" period after notice of cancellation had been given by respondent to petitioners.

The price, fixed with reference to petitioners' resale prices in Virginia, was unsatisfactory to respondent, being below its costs of acquiring gasoline on the Gulf Coast; and unsuccessful efforts had been made during the preceding summer by respondent to obtain an upward revision of the price provisions of the contract.

Under a new contract *(R. 73)* effective May 8, 1942, the date of termination of the previous contract, respondent raised petitioners' price on gasoline delivered between May 8th and July 10, 1942 to the latter's Norfolk terminal in an amount of one-half cent per gallon. Price control, in the meantime, had intervened and petitioners complained to the Office of Price Administration. Counsel for the OPA delivered an opinion that the price provision of the old contract, permitting variation by reference to petitioners' resale prices, was such a provision, under *Revised Price Schedule No. 88, Appendix A, Section (b)(2),*[1] as "permitted adjustments to reflect changes made prior to the date of such deliveries in the prices of the * * * petroleum products purchased or used by seller in order to make deliveries under such contracts"; and that consequently, on deliveries to petitioners' terminal, respondent's lawful maximum was its so-called base period price (that is, its price in October, 1941), 1-3/4¢ below the generally prevailing ceiling price of refiners, in Norfolk harbor, which was determined under the primary price fixing provision of *Price Schedule No. 88, Appendix A, Section (b)(1)*[2]

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[1] Relevant provisions of Price Schedule No. 88 are printed in the Appendix to this brief, *p. 11.*

[2] This brief, *Appendix, p. 11.*

Petitioners, in their brief, *pp. 8-10*, in stating their case have emphasized the opinion of the OPA referred to in the preceding paragraph. The occasion for respondent's restating the case here is to correct the impression which might be obtained, that attorneys for the Office of Price Administration had passed upon the question of the applicable ceiling price of the sales involved. Petitioners argued, successfully in the District Court, that the OPA had ruled upon the question of maximum price presented by the case. But the Circuit Court of Appeals clearly and unequivocally held that this ruling was not relevant to the sales actually in controversy (which were made after March, 1943), as appears from the following extracts from its opinion:

> "A fact which James River overlooks in its argument, and which was overlooked in the judgment of the court below, is that the sales between March and November, 1943 were made pursuant to a course of dealing fundamentally different from that which obtained in the year 1941." *(R. 174)*.
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> "James River attaches great importance to the letter of the Assistant General Counsel of OPA, to which reference has been made, holding that prices could not be established by Arkansas under subsection (b) (1) of the regulation. * * * Whether plaintiff's ceiling price between May and July of 1942, when it made sales in the same manner as in October of 1941, and between July, 1942 and of

March, 1942 when it made sales f.o.b. its refinery, was to be determined under (b) (2), as the Assistant General Counsel held in his letter, we need not determine. The fact is that beginning with March, 1943 sales were made on an entirely different basis; and it is only for these that plaintiff is seeking recovery. As indicated above, we think it clear that the ceiling price for these is to be determined under subsection (b) (1) of the regulation." *(R. 174).*

Returning to the chronology of events leading to this litigation, respondent, as was its right under the contract, declined making further delivery to petitioners' Norfolk terminal after the unfavorable ruling from the OPA. As was pointed out by the Circuit Court of Appeals in its opinion, the relevant parts of which have just been quoted, respondent in the summer and fall of 1942 sold some gasoline to petitioners delivered at respondent's Louisiana refinery. After petitioners were prevented by orders of government from bringing gasoline by tank car to Virginia, and after both parties were urged, by public authorities, to compose their differences, a new arrangement was made (in March, 1943), evidenced by written agreement *(R. 49, et seq.)*, in accordance with which respondent acquired gasoline from other refiners and sold it to petitioners; deliveries were made f.o.b. petitioners' trucks and barges, at terminals of refiners from whom respondent acquired the gasoline in Norfolk and Richmond. On these sales, which are the ones involved in the present suit, respondent charged petitioners a lower price than it paid refiners from whom it acquired.

Officials of the OPA were fully informed as to the prices being charged by respondent on the sales in question and of its conclusion that its prices were at or below its ceiling. Nothing in the record indicates any disagreement by OPA with these views, and nothing indicates any opinion by OPA's counsel that the sales were subject to the old controversial ruling on Norfolk terminal deliveries.

The Circuit Court of Appeals found by applying the relevant provisions of the Price Schedule to the facts that the agreed prices were below the lawful maximum; and held that there was no provision of the Price Schedule in question which interdicted respondent from changing the course of its business with petitioners in such manner as to bring into operation provisions of the Price Schedule different from those which would have applied to business conducted in the same manner as during the "base period". It is these rulings of the Circuit Court of Appeals which petitioners assign in this Court as error; and their reason for urging this Court to correct the alleged error is an asserted conflict with a case decided in 1943 by the Emergency Court of Appeals, *United States Gypsum Company vs. Brown, 137 Fed. (2d) 360.*

SUMMARY OF THE ARGUMENT.

1. No conflict exists between the ruling of the Emergency Court of Appeals in the case of *United States Gypsum Company vs. Brown, 137 Fed. (2d) 360* and the holding of the Fourth Circuit Court of Appeals in the present case. The Gypsum Company case is a ruling upon a direct attack on the Price Administrator's powers; while the

present case involves merely an examination and interpretion of a price schedule admittedly valid.

2. The present case contains no question of public importance.

ARGUMENT.

Asserted Conflict with U. S. Gypsum Company vs. Brown, 137 Fed. (2d) 360.

Petitioners, in the Circuit Court of Appeals, cited and strongly relied on the case of *United States Gypsum Company vs. Brown, 137 Fed. (2d) 360;* and the only reason urged upon this Court for the granting of certiorari is the asserted conflict between the ruling here and the holding of the Emergency Court of Appeals in that case. It is, however, significant that in its opinion the court below did not feel that it was necessary to notice this argument.

An examination of the opinion in the Gypsum Company case will demonstrate clearly that it did not involve the same question present in this case; and the Circuit Court was correct in ignoring it. The case, upon which the Emergency Court of Appeals ruled, was stated by the Court as follows:

> "Complainant, United States Gypsum Company, asks this court to set aside the General Maximum Price Regulation and Maximum Price Regulation No. 88—Manufacturers' Maximum Prices for specified Building Materials and Consumers Goods other than Apparel—as amended by Supplementary Order No. 31, insofar as they require complainant in selling gypsum products in California, Nevada

and Arizona to bear the burden of the transportation tax of 3% in the case of certain shipments from its Midland, California plant pursuant to sales to consumers in those states."

137 Fed. (2d) 360, 361.

That is to say, the Emergency Court of Appeals was called upon to pass upon a direct attack on the Price Administrator's power to require, by precise regulation, the continuance of a course of business considered undesirable by the complainant.

The court below on the other hand merely held, after an examination of *Price Schedule No. 88*, that the regulation contained no provision which would force respondent to continue a particular course of business. The fact that this was the ruling of the Circuit Court clearly appears from its opinion as follows:

"There is nothing in the law which forbade this change in the course of dealing and no reason why the prices prevailing in 1941 under one course of dealing should be accepted as the ceiling for prices in 1943 under an entirely different course of dealing for which other ceiling prices were established. To be concrete, there is no reason why the prices established for the gasoline delivered by ocean carrier to the terminal in 1941 should control the price of gasoline delivered from a terminal into cars and barges in 1943, in face of a regulation providing specifically that the ceiling in the latter case should be otherwise determined."

(R. 174)

The only reason urged by petitioners for the granting of certiorari by this Court appears, then, to be without substance. For the case upon which they rely, given its widest application, involved the *power* of the Price Administrator by precise regulation to require the Gypsum Company to continue quoting, and selling at, delivered prices; while the present case exhibits petitioners' unsuccessful attempt to discover a similar provision in *Price Schedule No. 88.*

The Case Involves No Important Question.

Inasmuch as the only reason advanced by petitioners for the granting of certiorari is the asserted conflict with the *Gypsum Company* case, there is no reason for extending this argument. It would likewise be a work of supererogation to cite and discuss this Court's rules, the decided cases, and the commentaries, on the exercise of review by certiorari. The fact is, of course, that this Court does not permit review by certiorari merely to grant to the unsuccessful litigant a second appeal.

We have refrained from arguing the correctness of the conclusions reached by the Circuit Court of Appeals; that Court applied the law—OPA's *Price Schedule No. 88*—to a mass of detailed facts in a way that respondent submits is obviously correct. But the point we make here is that the only question decided arose in the application of a regulation long since superseded and now totally repealed to a state of facts which certainly we are entitled to characterize as unique.

Without intending to make the slightest concession as to any doubt of the correctness of the judgment of the Circuit Court of Appeals, we still can say that, even if wrong, it established no principles to mislead anyone in the future.

CONCLUSION.

No question is presented in this case which would warrant further review by this Court. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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March 21, 1947.

APPENDIX.

Revised Price Schedule No. 88[1] of the Office of Price Administration, Appendix A, Subsections (b) (1), (b) (2) and (b) (3):

(b) *Petroleum products.* (1) The maximum price on each product sold, contracted to be sold, delivered, or transferred by a seller shall be the lowest quoted price published in the October 2, 1941 issue of *Platt's Oilgram* and the *Chicago Journal of Commerce*, the October 8, 1941 issue of the *National Petroleum News* or other publications designated by this Office, for a product of the same class, kind, type, condition and grade. Where such products are sold and prices are quoted on a delivered basis, then the maximum delivered price shall be the lowest quoted delivered price so published. Where products are sold and prices are quoted on an f.o.b. shipping point basis, then the maximum f.o.b. price shall be the lowest quoted f.o.b. price so published. Quotations in the above named periodicals for the States of California, Oregon, Washington, Arizona and Nevada shall not be used in determining maximum prices.

[1] *Revised Price Schedule No. 88* was effective February 2, 1942, and is officially reported, *7 F. R. 1371, Sections 1340.151, et seq.* The fact that the Office of Price Administration repeatedly amended its price regulations makes it difficult to determine from original sources what provisions were contained in a particular regulation at a particular time. It happens, however, that the OPA issued a reprint of Revised Price Schedule No. 88 on March 24, 1943, very near the time when the sales were made which gave rise to this suit, and which incorporated the various amendments to date. This reprint was made by the Government Printing Office under the identifying number "OPA 2411", and was issued by the Office of War Information with the news release identified as "OPA-T-685, Wednesday, March 24, 1943."

(2) Where the maximum price for a petroleum product at a given shipping or delivery point cannot be determined under subparagraph (1) of this paragraph the maximum price for each seller at such shipping point or delivery point shall not exceed the price charged at that point by him on the last sale of a substantial quantity of the same product to a purchaser of the same general class, within sixty days prior to October 15, 1941. Where the product is sold on a delivered basis at a given point the maximum price shall be the price charged on the last sale of a substantial quantity of the same product to a purchaser of the same general class made on a delivered basis at that point in the period specified. Where the product is sold at a given point on an f.o.b. shipping point basis, the maximum price shall be the price charged on the last f.o.b. shipping point sale at that point of a substantial quantity of the same product to a purchaser of the same general class in the period specified. The term "sale" in this subparagraph shall include sales and contracts of sale made during the period specified and deliveries made during the period specified under contracts made prior thereto which permitted adjustments to reflect changes made prior to the dates of such deliveries, in the prices of the petroleum and/or petroleum products purchased or used by the seller in order to make deliveries under such contracts. Deliveries during the period specified under contracts entered into prior thereto which did not permit such adjustments shall not be regarded as sales for the purpose of calculating maximum prices under this subparagraph.

(Paragraphs (1) and (2) as amended by Amendment 14, 7 F. R. 3552, effective 5-13-42).

(3) Where the maximum price for any petroleum product at a given shipping or delivery point cannot be determined under subparagraphs (1) or (2) above, a seller may sell such product at the maximum price of his most closely competitive seller of the same class as determined under subparagraphs (1) or (2) above.

(Paragraph (3) as amended by Amendment 31, 7 F. R. 7242, effective 9-16-42).